

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2023 CHRT 50
Date: October 26, 2023
File Nos.: HR-DP-2796-22

Between:

Ray Davidson

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Public Services and Procurement Canada

Respondent

Ruling

Member: Kathryn A. Raymond, K.C.

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I. The Three Complaints

[1] This is a procedural ruling arising out of case management of three separate complaints against different respondents brought by a common complainant, including this complaint. The complaints are: *Ray Davidson v Immigration, Refugees and Citizenship Canada and the Canadian Human Rights Commission* (“CHRC”) (Tribunal File T2503/6020 & T2659/3521), *Ray Davidson v Global Affairs Canada and CHRC* (Tribunal File No. T2582/13920) and *Ray Davidson v Public Services and Procurement Canada and CHRC* (Tribunal File No. HR-DP 2796-22). The three complaints filed by the Complainant are referred to here as the “IRCC complaint,” the “GAC complaint” and the “PPSC complaint” to differentiate them by respondent.

II. Request of the Parties for Bifurcation

[2] The parties to these three complaints have asked that each complaint receive two hearings, one to address liability and the other remedy. The parties propose that the liability issues in the three complaints be heard and decided by the Tribunal first. They suggest this be followed by three hearings for the Tribunal to hear the issues respecting remedy and issue remedial decisions, if required. The parties agree that all liability issues should be decided first. The parties are, otherwise, of the view that the sequence of hearing both the liability and remedy aspects of these cases is immaterial.

III. Summary of Outcome

[3] The proposal that the parties to these three separate complaints be provided six hearings by the Tribunal is denied. Among other reasons, it would be an unreasonable use of the Tribunal’s resources.

[4] Instead, procedural directions respecting the sequence these cases will be heard are provided. This is a more efficient and logically consistent approach to the potential issues of overlap between the complaints.

[5] The Tribunal also reserves jurisdiction respecting matters in this ruling including to alter the directions provided in this ruling should unanticipated circumstances arise during the hearing of the evidence.

IV. The Issues in Each Complaint

[6] In all three complaints the Complainant alleges he was not successful in applying for a new position with the relevant respondent for discriminatory reasons. He seeks remedies that include general damages for having been discriminated against (to reflect the alleged impact of the discrimination upon him) and damages for loss of income.

V. The Issues in This Ruling

[7] Over the course of case management, the Tribunal asked the parties whether the complaints should be heard together, whether any of the hearings of the Complainant's cases should be coordinated in sequence with other of his complaints, and whether any of the complaints should have liability and remedy heard separately (the legal term for this is "bifurcation" of a complaint).

[8] The parties have requested bifurcation of all complaints. The underlying questions are:

- (1) whether any of the Complainant's complaints overlap, and, if so, how;
- (2) whether the Tribunal should order that the three complaints be bifurcated into six hearings, three for liability and three for remedy; and,
- (3) what procedural orders should be given by the Tribunal to aid the logical and efficient resolution of the complaints.

VI. Procedural Background

[9] The parties in the IRCC and PPC complaints and the Respondent GAC are represented by counsel. The Complainant is self-represented in the GAC complaint. The Complainant is represented by the same counsel in the IRCC and PSPC complaints.

[10] The IRCC and PSPC complaints are still in case management; the GAC complaint is going to hearing shortly. The procedural history of these matters and the Tribunal's desire to preserve the hearing dates in the GAC complaint provide relevant context to this ruling and the issues of procedural efficiency.

A. Initial Discussions about Potential Procedural Efficiencies

[11] In the PSPC complaint, the issue of whether there was any potential for overlap on the issue of liability was initially raised with the parties at the first case management conference call ("CMCC") on January 27, 2023. The parties were of the collective opinion that the three complaints were separate and independent of one another. For example, the parties did not believe there was a need to hear the IRCC complaint, which occurred first in time, before the PSPC complaint; Complainant's counsel suggested the opposite could occur. The alleged events which gave rise to the GAC complaint occurred between the IRCC and PSPC complaints. However, the potential need to sequence the hearings to reflect the alleged events was dismissed by the parties on the basis that the liability issues in the complaints were unrelated.

[12] The potential for overlapping issues respecting liability was raised again by the Tribunal at the March 31, 2023 CMCC on the PSPC file. This is because the Complainant's SOP for the PSPC complaint contained content about his performance in an acting managerial role at IRCC and IRCC references relevant to his application to PSPC. Complainant's counsel has confirmed that the IRCC complaint is not relevant to the PSPC complaint except as background about the Complainant's qualifications for the new position with PSPC.

[13] The issue of potential overlap respecting remedy was raised by the Tribunal at the CMCC of December 6, 2022 in the IRCC complaint, at the CMCC for the PSPC complaint on January 27, 2023 and at the CMCC for the PSPC complaint on March 31, 2023. There was no clear response. The Tribunal advised the parties in all three complaints that, if any of the complaints are upheld, the Tribunal would decline to make any order as between the complaints that would constitute a double recovery of compensation for the Complainant.

B. Delay in Response to Procedural Issues in the IRCC and PSPC Complaints

[14] The parties in the IRCC and PSPC complaints did not address several pre-hearing issues in a timely way during case management; these included addressing the issue of overlap in remedies between the complaints. The Tribunal set a date of May 13, 2023 for the parties to respond to that issue. The parties did not comply with this direction. This necessitated further follow-up and directions. The Tribunal received assurances twice, most recently by letter August 1, 2023, that “discussions about the efficient adjudication of damages were underway among the parties in all three complaints.” The following direction was issued by the Tribunal on August 4, 2023: “The parties are to conclude their discussions respecting overlap of both liability and remedy issues and write the Tribunal with a specific proposal identifying and, where appropriate, explaining the proposed approach to any and all areas of overlap by October 16, 2023.”

C. Ongoing Case Management of the GAC Complaint

[15] In the meantime, extensive case management of the GAC complaint continued over the same period. The potential overlap respecting remedy between the GAC and IRCC complaints was addressed in case management. It was determined that there was no overlap in terms of remedy as between the GAC and PSPC complaints.

[16] The parties in the GAC complaint were provided several opportunities to amend their SOPs which was required to provide better particulars, including better particulars of the loss of income claim. It was determined that the Complainant would provide two alternate calculations of alleged loss of income in his SOP to which the Respondent would respond. The relevance of either was understood to depend on the Tribunal’s potential findings in the IRCC complaint. The Complainant had applied to work as a consultant with GAC while he was still employed with IRCC. Hearing dates were eventually set to begin in late November 2023.

[17] Hearing dates were set for the GAC complaint because the parties to the three complaints stated that there was no overlap in any liability issues as between the IRCC and GAC complaints and, likewise, the GAC and PSPC complaints. The GAC complaint involved

a term contract, as opposed to the ongoing loss of income claims in the other complaints. The remedy issues appeared to be the simplest to address first. Most importantly, the GAC complaint had reached the point that it was appropriate to set hearing dates. It had become apparent in case management that the other two complaints would not be ready to proceed to hearing close in time to the GAC hearing.

[18] The Tribunal advised counsel in the IRCC and PSPC complaints of the hearing dates for the GAC complaint. Counsel were directed to make best efforts to not disrupt the progress and hearing of the GAC complaint, in which the Complainant is self-represented, as they continued discussions respecting overlap in remedy among all three complaints as directed by the Tribunal on August 4, 2023.

VII. The Response from the Parties in October 2023

[19] On October 16, 2023, Complainant counsel re-confirmed that all parties agree that there is no issue of overlap respecting whether the Respondents discriminated against the Complainant in the three complaints; the parties continued to take the position that the complaints can be heard independently of one another. It was briefly mentioned that the Commission took the position that the “time period for liability of each complaint” may “depend on which of the files is heard and decided first” and that this “may affect the amount the Tribunal could award” to avoid duplicating an award of damages pursuant to section 53(2).

[20] Complainant counsel advised that the parties agree that there is overlap on issues of remedy as between all three complaints. Complainant counsel made factual statements in the letter purporting to describe when (the time periods) the overlap in remedy would occur as between the three complaints, should the Complainant establish liability in all three. There is no identification in the letter of what remedial issues may overlap, apart from reference to future loss of income. Complainant’s counsel states that the Complainant “is asking for future loss of income in all 3 cases.”

[21] The parties also took this position:

Even if the issue of remedy is not bifurcated, any decision on remedy in one case will directly impact the Tribunal's award in the other cases. The parties are aware that duplication of awards under section 53(2) [of the Act] will be avoided.

[22] All parties proposed that the three complaints be bifurcated by having separate hearings for liability and remedy.

VIII. Claims, In Part, Incorrectly Described

[23] The information provided in the letter of October 16, 2023, is not entirely accurate. Complainant counsel asserts that there is overlap between the IRCC and the GAC complaint after April 2017 to the present. There is not. The alleged factual overlap on the issue of remedy is from January 2016 to April 2017. The Complainant filed a Fourth Amended Statement of Particulars ("4th ASOP") respecting the GAC complaint on September 9, 2023. The Complainant seeks lost wages for 64 weeks beginning in January 2016 and ending in April 2017.

[24] Accordingly, Complainant's counsel is also incorrect when he states that there is overlap between the GAC complaint and the IRCC/PPSC complaints from April 3, 2019 to the present. No future loss of income is claimed by the Complainant in the GAC complaint.

[25] The Tribunal will address this matter separately with the parties.

IX. The Error Does Not Require Further Submissions

[26] Some parties may possibly have taken the position they did about bifurcation based on the information provided by Complainant's counsel that the GAC complaint includes a future loss of income claim, rather than review of other sources of information such as the SOPs for the other complaints. The Tribunal considered whether the parties should be given a further opportunity to respond. However, the Tribunal is not prepared to postpone the overall management of these complaints any longer because of this factual error.

[27] The parties have had an extensive period to discuss and analyze the overlap issues beginning in January 2023. They shared the responsibility to provide their positions to the Tribunal based on an accurate understanding of overlap among the three complaints.

[28] A decision respecting bifurcation of the GAC complaint is required now so that the parties can complete their preparations for the hearing in November with certainty. The CMCC for the hearing is November 1, 2023. Remedy issues in the GAC complaint have been canvassed in case management, including that the SOPs were recently amended again in preparation for the hearing. There is no impact on the GAC complaint by reason of the error. Overlap between the IRCC and GAC complaints respecting remedy has been addressed. An aspect of bifurcation in the GAC complaint that requires clarification for all parties will be explained below. Events are also occurring on the IRCC and PSPC complaints; those efforts should not be distracted.

[29] The factual error does not warrant re-opening the issues in this ruling for submissions given the overall procedural impact of further delay in these cases. As well, the Tribunal has considered the relevant issues in making this ruling.

[30] Accordingly, the Tribunal is not seeking further submissions from the parties on the issue of overlap in remedy. If a party on the IRCC and PSPC complaints believes they are prejudiced in some way by this ruling, they may identify the problematic part of what is ordered and request reconsideration by November 3, 2023.

X. The Tribunal's Procedural Jurisdiction to Bifurcate a Complaint

[31] The Tribunal has sole discretion and authority over procedural matters granted by section 50(3)(e) of the *Canadian Human Rights Act*, R.S.C. 1985, c.H-6 ("Act") and the Tribunal's Rules of Procedure (the "Rules"). The Tribunal is exercising that discretion to ensure the logical and efficient progression of these complaints.

[32] The Tribunal has held that it has the jurisdiction to order bifurcation: see *Wallace (on behalf of Jaxon Joselin Wallace) v. Madawaska Maliseet First Nation*, 2021 CHRT 23 (CanLII) where then Vice Chair, now Chair Khurana concisely stated:

The Tribunal can determine its own process in deciding issues raised by a human rights complaint. Tribunal processes must be fair. They must give all parties a full and ample opportunity to be heard and proceedings must be conducted as informally and expeditiously as possible (ss. 48.9(1) and 50(1) of the *Act* and Rule 1(1) of the Tribunal's Rules of Procedure ("Rules")).

XI. When Bifurcation Should Be Ordered

[33] The Tribunal ordered bifurcation in *Day v. Canada (Dept. of National Defence)* (No. 2), 2002 CanLII 78202 (CHRT), <<https://canlii.ca/t/jdc5g>> ("Day") because it made a difficult case easier for a self-represented complainant. In *Day*, the remedy issues were described as raising "delicate issues" for the parties. There were "good reasons to believe that any questions of remedy will distract the parties from the factual questions that need to be addressed before proceeding further" (at para 4).

[34] In the GAC complaint, the claim for general damages and the loss of income issues are relatively straightforward. *Day* was decided in 2002 when the Commission regularly took the lead in presenting cases to the Tribunal. Currently, most complainants are self-represented, and the Commission may not participate in the hearing. Our Rules require that remedy be addressed in the SOPs filed by the parties, which means that many self-represented complainants are expected to do so. In GAC, better particulars of remedy have been directed to be included in the SOPs in case management. The parties, therefore, are already dealing with these issues, unlike the situation in *Day*.

[35] The circumstances in the GAC complaint are much closer to those in *Parent v. Canadian Forces*, 2007 CHRT 14 (CanLII), <<https://canlii.ca/t/1sbnx>> ("Parent") where Member Hadjis denied a request for bifurcation between liability and remedy. The key reason offered for the request was the benefit of avoiding a hearing respecting remedy unless there was a finding of liability. Member Hadjis emphasized the Tribunal's obligation to avoid further delay by completing the resolution of all issues, given the statutory objective under section 48.9(1) of the *Act* that hearings be conducted informally and expeditiously.

[36] If the GAC complaint were being considered in isolation, the Tribunal would not order bifurcation. As in *Parent*, the circumstances do not warrant it. The same can be said of the other two complaints.

XII. When Multiple Complaints Should be Bifurcated

[37] While the Tribunal would not exercise its discretion to bifurcate any of these complaints as individual cases, the issue here is whether bifurcation should be ordered when there are multiple complaints. Bifurcation of multiple complaints, in my view, involves both consideration of each complaint and the overall picture.

[38] As highlighted, the efficient resolution of a complaint is a statutory objective under the *Act*. Whether bifurcation of multiple cases achieves efficiencies to offset the time taken by the Tribunal to address bifurcation and any potential delay in the final resolution of all the cases will be fact specific. (This is not to suggest that efficiency is the only consideration. *Day* is an example where other considerations appear to have been in play.)

[39] In my view, when there are multiple cases, the first consideration is whether bifurcation is required to ensure that the information the Tribunal needs to decide issues is available to the Tribunal. This is an issue where, as is the case here, the Tribunal and parties determined at an early stage that it is not appropriate for the cases to be heard together in one hearing.

XIII. Proposal for Bifurcation as Described by the Parties

[40] The parties' proposal that the complaints be bifurcated - that there be three separate hearings for liability and three for remedy - means that the remedy issues on each of the three complaints would be heard and decided after all three complaints are heard and decided on the issue of liability. It was not suggested that the cases should be heard in any particular order; there was no proposal about how to accommodate the upcoming GAC hearing.

[41] The parties did not write the Tribunal as directed "with a specific proposal identifying and, where appropriate, explaining the proposed approach to any and all areas of overlap." There is no explanation by the parties of what specific remedial issues bifurcation would resolve or why it is the best solution across the board.

XIV. Avoiding Duplication and the Accuracy of Damage Awards

[42] Complainant counsel did re-confirm that the parties are aware that awards under section 53(2) of the *Act* will not be duplicated. Avoiding duplication, or the double recovery of damages by a complainant, is to be avoided. It is well-settled law that the purpose of compensation is to make a person whole, not to lead them to secure a windfall or put them in a better position than they would have been but for the discrimination. Avoiding duplication is a matter of reconciling a complainant's entitlement to damages as between complaints when damages are being awarded that overlap.

[43] The parties did not explain why or how bifurcation of all the three complaints and hearing the complaints independently of one another, in no particular order, would avoid duplication of entitlement to damages. The parties did not appear to fully consider whether there was a sequence in which the cases should be heard because of remedy; perhaps they were focused on the lack of overlap in liability among the cases.

[44] The Commission did identify that the sequence the cases are heard can be relevant. However, the Tribunal does not agree with the Commission's conclusion about why this is so. The Commission's position is that the "time period for liability of each complaint may depend on which of the files is heard and decided first and that this may affect the amount the Tribunal could award to avoid duplicating an award of damages pursuant to section 53(2)."

[45] The amount of damages awarded in any one complaint is to be determined based on what evidence the parties present and the facts that are found to exist by the Tribunal respecting the Complainant's experience, not the order in which the cases are heard. The "time period for liability" of each complaint should not depend on which file is heard first. It depends upon the facts.

[46] Any order for the payment of compensation is required to be calculated accurately against the relevant respondent. It would be a legal error for the Tribunal to order payment of compensation against the first respondent to proceed to hearing, without regard for the other complaints before the Tribunal, and then reduce or adjust the amounts to be paid by other respondents who go to hearing subsequently and are then found liable. Assuming

liability is established in all three complaints, each of the Respondents in the IRCC, GAC and PSPC complaints should not pay more in damages than they are each legally responsible to pay.

[47] Here, the facts for each complaint may include facts or disputed facts that arise in one of the other complaints. These facts may need to be considered or resolved by the Tribunal to arrive at an accurate award.

XV. A Note about Potential Overlap in General Damages

[48] The IRCC complaint began November 1, 2015 and pre-existed the GAC complaint until January 1, 2016. The GAC complaint overlaps with the IRCC complaint, the latter of which is ongoing, as between January 1, 2016 and April, 2017.

[49] If liability is established in the GAC complaint, which will be determined first, the Tribunal will be asked to order general damages. General damages are compensation for pain and suffering by reason of the discrimination. The Tribunal may consider the duration of any discriminatory experiences, as well as the duration of any negative impacts from discrimination, when determining how much to award as general damages.

[50] Here, the Complainant also intends to claim general damages for discrimination by IRCC. The IRCC complaint will not have been heard. The two complaints are close in time to one another. It would not be fair or reasonable for the Tribunal to order the Respondent GAC to pay some portion of general damages that ought to be paid by IRCC to the Complainant (or vice versa) simply because the GAC case is heard first.

[51] The two claims for general damages may be separate. If so, there will not be an issue in this regard. However, it is possible that the evidence at the hearings could indicate that there is overlap relevant to an award of general damages. If so, the Tribunal may need to apportion those negative impacts upon the Complainant as between each complaint and, therefore, each Respondent.

[52] It is premature to know whether this is an issue. The Tribunal provides preliminary directions below so that areas of possible significance to the overlap issue are addressed in one shared ruling.

XVI. The Sequence the Cases are Heard and Decided is Relevant

[53] The Tribunal concludes that the sequence the three complaints are heard and decided is a relevant procedural consideration in resolving some of the substantive issues in these complaints. As noted, however, Respondents did not raise an issue about the sequence in which the three complaints are heard. Duplication, in theory, can be avoided by bifurcating each complaint and then ordering that the remedy issues be heard and decided in sequence according to the alleged events experienced by the Complainant. This was not requested. In any event, this would be an unnecessarily convoluted procedural path compared to hearing the cases in their factual sequence to begin with.

XVII. Comparison to Bifurcation

[54] The Tribunal is not persuaded that the parties' proposal to bifurcate all complaints is necessary, proportionate, and efficient.

[55] Bifurcation doubles the number of hearings. The parties propose that the Tribunal hold as many as six hearings for one complainant and three respondents and issue as many as six decisions. The Tribunal has many parties awaiting hearing. The Tribunal's resources are not unlimited.

[56] Bifurcation adds additional scheduling issues to a complaint. This will be exacerbated here, where there are multiple separate complaints. Delay is difficult to prevent in scheduling multiple hearings given the schedules of the Tribunal and counsel. The proposed bifurcation would also unnecessarily postpone the conclusion of any case that does not require bifurcation, while the parties wait for others to be decided. There is risk of unnecessary and compounded delay.

[57] The parties have failed to persuade the Tribunal that their wholesale proposal to bifurcate all complaints is justified. Bifurcation should not be ordered in the absence of procedural benefits that clearly outweigh its procedural disadvantages.

XVIII. Overall Conclusion

[58] The Tribunal exercises its discretion and declines to order bifurcation of the three complaints into six hearings notwithstanding the agreement of the parties that this occur.

[59] The Tribunal finds that the order these complaints are heard is relevant to the effective and efficient progress of these cases. It is the simplest overall procedural course of action. It is also necessary. If these cases are not heard in sequence, the parties may not have the information they need to complete their cases respecting remedy, at least in relation to loss of income, and the Tribunal may not have what it requires for its decisions.

[60] Instead of ordering bifurcation, the Tribunal is providing specific procedural directions for each complaint.

XIX. Conclusions and Directions for Each Complaint

A. The GAC Complaint

(i) Identifying Known Issues of Overlap in the GAC Complaint

[61] As explained, there is overlap between the IRCC complaint and the GAC complaint by reason of the past loss of income claimed from GAC from January 2016 to April 2017. If the Complainant establishes liability against GAC and satisfies the Tribunal that he is entitled to an award of past loss of income, the issue of mitigation of his loss of income will need to be addressed. The Complainant was employed by and has already received income from IRCC during the alleged period of the Complainant's loss of income claim in the GAC complaint.

[62] The mitigation issue may be further narrowed. If the Complainant is entitled to a loss of income claim against GAC, the issue will be whether he should be required to mitigate

his loss of income claim by his actual employment income from IRCC during the relevant period of his loss, or, whether he is required to mitigate those damages by the amount he would have earned had he been successful in obtaining a PM-6 level position from IRCC (whether he should have been successful in securing a PM-6 level position is the issue in the IRCC complaint). The earnings associated with positions at these levels is different, with a PM-6 level position paying more than a PM-5 level position.

[63] As a result, resolving the mitigation issue in the GAC complaint requires that it be determined whether the Complainant would have been working at a PM-5 or PM-6 level for IRCC in the relevant period. That will not be known until the Tribunal decides whether the Complainant is entitled to the PM-6 position. In other words, the mitigation issue, which is potentially relevant to an award of loss of income in the GAC complaint, cannot be finalized until the issue of liability in the IRCC complaint is heard and decided by the Tribunal.

(ii) Procedural Directions for the GAC Complaint

[64] As the Complainant is self-represented, detailed directions are provided.

[65] As noted, the Complainant was directed to prepare his amended SOPs with a calculation of his loss of income claim using mitigation numbers based on earnings at both a PM-5 and PM-6 level from IRCC. The Tribunal directs that the parties to the GAC complaint proceed at the hearing on the same basis that they were instructed to complete their amended SOPs. The parties will present their cases respecting remedy fully (both evidence and submissions) at the hearing, in addition to the issues respecting liability. This will preserve the hearing dates for this complaint.

[66] The Tribunal will decide if GAC is liable for discrimination. If so, the Tribunal will decide whether the Complainant is entitled to any general damages. Those general damages must be proven to flow from the discrimination. When the Complainant presents his case at the hearing, he is to include his case for an award of general damages.

[67] If the Tribunal finds the Complainant is entitled to general damages, the Tribunal will require the Complainant to take a final position in the IRCC complaint respecting whether his claim for general damages against IRCC ends as of December 31, 2015, if he has not

already done so. If that is his position, there should be no issue of overlap between the two complaints respecting general damages, only loss of income between January 2016 and April 2017.

[68] If there is an overlapping claim of general damages, which appears unlikely, the Tribunal may decide to hold a *voir dire* in the GAC case. This would determine whether evidence should be received in the GAC complaint about the Complainant's state of mind and other matters relevant to the assessment of general damages prior to January 1, 2016. This is a preliminary suggestion only. Other procedural options may be considered. The Tribunal will not make a decision respecting general damages that overlap with the IRCC complaint without IRCC having an opportunity to be heard.

[69] The Tribunal will also decide whether the Complainant is entitled to any loss of income in the GAC complaint. The Complainant must establish on a balance of probabilities that any loss of income arose from discrimination.

[70] If the Complainant is entitled to loss of income, the Tribunal will determine the gross, theoretical amount of the loss of income from GAC. The Tribunal will make a final decision, based on the evidence, about whether the amount of lost income awarded should be adjusted to reflect mitigation of the Complainant's loss of income. Accordingly, the parties are to present evidence respecting the two different but potentially applicable mitigation calculations respecting income from IRCC during any period of overlap in earnings.

[71] The Tribunal will decide, if necessary, what the calculation of mitigation is and determine the final, adjusted gross amount of any loss of income award, or, it may direct the parties to do so and reserve jurisdiction to resolve any issues the parties are unable to resolve on their own.

[72] Decisions respecting mitigation and loss of income will be made after the Tribunal hears and decides the IRCC complaint. Deciding the IRCC complaint will resolve the issue of whether the Complainant would have been employed by IRCC at a PM-5 or PM-6 level, and if so, when, and what the Complainant's earnings from IRCC would have been during the relevant period. This will provide the information needed for the calculation of any mitigation of a loss of income awarded against GAC.

[73] In summary, the GAC hearing will not be bifurcated. It is not necessary. However, the Tribunal's decision respecting remedy and/or the amount of mitigation and the actual loss of income claim will be bifurcated from its decision respecting liability. In other words, the Tribunal's decision respecting the GAC complaint will be bifurcated as needed, not the complaint and not the hearing.

[74] This allows the parties to address all issues at once and avoids the delay of scheduling a further hearing to receive the evidence or submissions respecting remedy in the GAC complaint. The remedy issues should take less than a day of hearing. It is most efficient to use the time that is already allocated for the hearing of the GAC complaint, which was scheduled on the basis that all issues would be addressed.

B. The IRCC Complaint

(i) Identifying Known Issues of Overlap in the IRCC Complaint

[75] Given that there is an overlap between the IRCC and GAC complaints respecting loss of income, it is theoretically possible that the Complainant may also need to address the issue of mitigation in the IRCC case. The Complainant claims that he should have been promoted to a PM-6 position by IRCC in 2015. The Tribunal was advised by the Complainant in the GAC matter that the term position the Complainant applied for with GAC beginning January 1, 2016 pays more than the PM-6 position with IRCC. Assuming liability is established against GAC, the loss of income claim against GAC continues until April 2017. Whether this is significant or not and should be addressed may need to be determined based on what the evidence is at the hearings of these matters.

[76] In addition, as explained at the outset, Complainant's counsel identified an issue of overlap between the IRCC and PSPC complaints respecting future loss of income in his response to the Tribunal on behalf of the parties on October 16, 2023. An issue of overlap will arise if the Complainant is found to be entitled to a future loss of income claim against IRCC and if that claim is determined by the Tribunal to extend beyond April 3, 2019.

[77] In that event, the Tribunal may be required to apportion the future loss of income claim as between the Respondents IRCC and PSPC, for the reasons explained in the context of overlapping general damages above.

[78] If the parties' proposed plan of bifurcation were adopted, the remedy issues in IRCC would be bifurcated from liability and decided after liability is determined in the PSPC complaint. Bifurcating the IRCC complaint as between liability and remedy would create delay in resolving all the issues respecting remedy in the IRCC case. There is no reason to delay all decisions respecting remedy in the IRCC complaint for the PSPC complaint. They do not all overlap. They may not overlap at all.

[79] It is also necessary to have a decision that addresses both liability and remedy to the extent practicable in the IRCC case so that the parties, the Tribunal, and the parties to the PSPC complaint will know whether the Complainant is entitled to a future loss of income claim in the IRCC case and whether it is, therefore, relevant to the PSPC complaint.

(ii) Directions for the IRCC Complaint

[80] The Tribunal will proceed to hear and decide the IRCC complaint after the GAC complaint is heard and the issue of liability in the GAC case is decided. If there is no finding of liability in the GAC complaint, or if no loss of income is awarded for a period relevant to the IRCC case, there will no longer be an issue of overlap as between the GAC and IRCC complaints. The IRCC complaint can proceed to be heard and decided on its own.

[81] In these circumstances, the proposed bifurcation of the hearing of the IRCC complaint as between liability and remedy, in the context of the GAC complaint, is an excessive and unnecessary step.

[82] Subject to one exception, described below, the Tribunal directs that the IRCC complaint be heard and decided in its entirety before the PSPC complaint is heard and decided. A complete (as practicable) decision respecting the IRCC case will determine whether there is any overlap between the IRCC complaint and the PSPC complaint and, therefore, whether the IRCC case has any substantive relevance to the PSPC complaint.

[83] Hearing the IRCC case first may also facilitate the Tribunal's ability to hear and decide the PSPC complaint. To the extent that the IRCC complaint is said to provide background to the PSPC complaint, a decision respecting the IRCC case will settle the facts in that case and may resolve factual background issues for the PSPC case.

C. The PSPC Complaint

(i) Identifying Known Issues of Overlap in the PSPC Complaint

[84] As explained, the potential for overlap in remedy between the PSPC complaint and the IRCC claim is in relation to a future loss of income claim. This claim depends on, first, a finding that IRCC is liable for discrimination and, secondly, a decision that IRCC is required to pay a future loss of income award in the IRCC complaint that extends past April 3, 2019. In other words, the possibility of overlap between the IRCC complaint and the PSPC complaint hinges on a finding of liability against both Respondents IRCC and PSPC and a finding that a relevant future loss of income claim exists after April 3, 2019 in the IRCC case.

(ii) Directions for the PSPC Complaint

[85] Subject to the one exception referenced below, the Tribunal will hear and decide the PSPC case in its entirety without bifurcation. This case will be heard and decided in its entirety following the IRCC decision.

(iii) The Exception

[86] The exception is as follows: if the Tribunal determines that the Complainant is entitled to a future loss of income in the IRCC complaint and finds that the loss of income claim extends beyond April 3, 2019, the Tribunal may reserve judgement in the IRCC complaint respecting issues such as the nature, duration, extent or calculation of the future loss of income claim and any issue of apportionment between IRCC and PSPC, as may be required, in which case the Tribunal will decide the outstanding issues in the IRCC complaint after or in conjunction with the PSPC complaint.

XX. Orders for the Three Complaints, As Applicable

[87] As is applicable to the IRCC, GAC and PSPC complaints, the Tribunal hereby orders that:

1. The parties to the GAC complaint will present their cases respecting liability and remedy completely at the hearing of that complaint;
2. The Tribunal will issue a decision respecting liability in the GAC complaint to the parties;
3. The IRCC case will be heard by the Tribunal after the decision respecting liability in GAC is issued to the parties;
4. The Tribunal will issue a decision respecting the IRCC complaint regarding both liability and remedy, except that if the Tribunal determines that the Complainant is entitled to a future loss of income and finds that the loss of income claim extends beyond April 3, 2019, the Tribunal may reserve judgement respecting issues such as the nature, duration or extent or calculation of the future loss of income claim and any issue of apportionment between IRCC and PSPC;
5. If applicable, the Tribunal will issue a decision respecting remedy in the GAC complaint after the IRCC complaint; this may include, as applicable, either determinations of or directions to the parties respecting the calculation of any amount earned in mitigation by the Complainant and the adjusted final gross amount of any loss of income claim awarded to the Complainant; if directions are given to the parties, the Tribunal will reserve jurisdiction to resolve any issues the parties are unable to resolve;
6. The PSPC complaint will be heard and decided by the Tribunal in its entirety following the IRCC decision except that, if the Tribunal determines that the Complainant is entitled to a future loss of income from IRCC and that loss of income claim extends beyond April 3, 2019, the Tribunal may reserve judgement in both or either the IRCC and PSPC cases respecting the nature, duration, extent or calculation of the future loss of income claims in either case and any issue of apportionment as between IRCC and PSPC and decide those issues separately;
7. The Tribunal reserves jurisdiction concerning the application, implementation or interpretation of this ruling until fully implemented; and

8. Should the Tribunal be persuaded to reconsider any order in this ruling or should there be a change in circumstance by reason of evidence at a hearing, the Tribunal reserves jurisdiction to amend its conclusions, procedural orders and directions.

Signed by

Kathryn A. Raymond, K.C.
Tribunal Member

Ottawa, Ontario
October 26, 2023

Canadian Human Rights Tribunal

Parties of Record

Tribunal Files: HR-DP-2796-22

Style of Cause: Ray Davidson v. Public Services and Procurement Canada

Ruling of the Tribunal Dated: October 26, 2023